SUPREME COURT OF THE UNITED STATES.

No. 73.—October Term, 1927.

Andrew W. Mellon, Director General of Railroads and Agent of the President, Petitioner, vs. Arkansas Land & Lumber Company.	On Writ of Certiorari to the Supreme Court of the State of Arkansas.

[January 3, 1928.]

Mr. Justice Sanford delivered the opinion of the Court.

The question in this case relates to the construction and effect of the provision in § 206 of the Transportation Act, 1920,[1] which permitted suits on causes of action that had arisen during the Federal control of railroads to be brought thereafter against an Agent designated by the President. This section, in so far as here material, provided that actions at law based on causes of action arising out of the operation by the President of the railroad of any carrier, might, after the termination of Federal control, be brought against "an agent designated by the President for such purpose . . . within the periods of limitation now prescribed by State or Federal statutes"; and that a judgment "rendered against the agent designated by the President" should be paid out of a revolving fund created by the Act.

On July 23, 1918, a cause of action accrued in favor of the Arkansas Land & Lumber Company on account of the misdelivery of a carload of lumber shipped by it over the railroads of two carriers then being operated under Federal control. The Arkansas statute of limitations provided that suit "shall be commenced within three years after the cause of action shall accrue, and not after."[2]

No suit was brought during the period of Federal control, which terminated on March 1, 1920.[3] Thereafter, on July 9, 1921—nearly three years after the cause of action accrued—the Company brought

[1] 41 Stat. 456, c. 91.

[2] Crawford & Moses Digest of the Statutes of Arkansas (1921), § 6950.

suit in an Arkansas circuit court against "John Barton Payne, Director General, as Agent for" the railroad carriers, alleging that he then was "the agent duly designated by the President" against whom suits might be brought.[4] At that time Payne was not the Agent designated by the President, having resigned as Director General and designated Agent more than three months before; and James C. Davis had been designated by the President and then was the Agent.[5] In October, 1921—more than three years after the cause of action accrued—on a plea in abatement by Payne to the effect that he was not the designated Agent, the court dismissed the suit as to him; and, on motion of the plaintiff, Davis, the designated Agent, was substituted as the defendant. Davis, thereafter appearing, pleaded that under § 206 of the Transportation Act the suit could not be prosecuted against him as he had not been made a party within the period of limitation prescribed by the Arkansas statute. The circuit court sustained this plea and dismissed the suit. The Supreme Court reversed the judgment on the ground that the substitution of Davis was not the institution of a new action against him, but merely an amendment correcting the name of the defendant in furtherance of justice; and remanded the cause to the circuit court. 155 Ark. 541. Davis there renewed his plea under the Transportation Act. This was overruled, and judgment was rendered against him. The Supreme Court—in which the petitioner, who meanwhile had succeeded Davis as the designated Agent,[6] was substituted as the appellant—adhered to its former ruling and affirmed the judgment. 170 Ark. 552.

This, we find, was error. The United States had not consented to being sued after the termination of Federal control except as provided by § 206 of the Transportation Act, that is, by a suit brought against the Agent designated by the President for such purpose, within the period of limitation prescribed by the State statute. This plainly meant that the suit must be brought within

[3] Transportation Act, § 206 (a).

[4] The railroad carriers were also made defendants, but on their demurrers the suit was dismissed as to them. Missouri Pacific Railroad v. Ault, 256 U. S. 554; Davis v. Cohen Co., 268 U. S. 638; Mellon v. Weiss, 270 U. S. 563.

[5] Proclamation, 42 Stat. 2237.

[6] Proclamation, 44 Stat. 2598.

the period of limitation against the person who was the designated Agent and alone had authority to represent the Government. The bringing of the suit against Payne, who was not the designated Agent, was not a compliance with this requirement and brought no representative of the Government before the court. *Davidson* v. *Payne* (C. C. A.), 289 Fed. 69. The substitution of Davis, the designated Agent, was not the correction of an error in the name of the defendant, but the bringing in of a different defendant, and was in effect the commencement of a new and independent proceeding against him to enforce the liability of the Government. See *Davis* v. *Cohen Co.*, 268 U. S. 638, 642; *Mellon* v. *Weiss*, 270 U. S. 565, 567. And, as this substitution, being made more than three years after the cause of action had accrued, was not a compliance with the requirement of the Transportation Act that the action be brought against the designated Agent within the period of limitation prescribed by the State statute, the plea should have been sustained and the suit dismissed.

This conclusion is substantially the same as that in *United States* v. *Davis* (D. C. App.) 8 F. (2d) 907; *Vassau* v. *Northern Pacific Railway*, 69 Mont. 305; *Davis* v. *Griffith*, 103 Okla. 137; and *Natoli* v. *Davis*, 75 Cal. App. 309; *contra*, *Bailey* v. *Hines*, 131 Va. 421.

The judgment is reversed, and the cause remanded to the Supreme Court of Arkansas for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 74.—October Term, 1927.

Andrew W. Mellon, Director General of Railroads, as Agent designated by the President, etc., Plaintiff in Error, vs. Thomas E. O'Neil.	In Error to the Supreme Court of the State of New York.

[November 21, 1927.]

Mr. Justice Sanford delivered the opinion of the Court.

The record presents a preliminary question as to our jurisdiction under the writ of error.

The writ is brought to review a judgment of the Appellate Division of the Supreme Court of New York, which affirmed, without opinion, a judgment rendered at Trial Term against the plaintiff in error, as Agent designated by the President under the Transportation Act, 1920. 215 App. Div. 766. Leave to appeal to the Court of Appeals was denied both by the Appellate Division and by the Court of Appeals; and the judgment of the Appellate Division thereby became the final decision of the highest court of the State in which a decision could be had.

This judgment was entered after the Jurisdictional Act of 1925[1] took effect. The only error assigned here that presents a ground for the writ of error under § 237 of the Judicial Code as amended by § 1 of this Act,[2] is that the provisions of the New York Civil Practice Act relating to the amendment of process and substitu-

[1] 43 Stat. 936, c. 229; printed as an Appendix to the Revised Rules of this Court, 266 U. S. 687.

[2] Sec. 237 (a) of the Judicial Code, as thus amended, now provides that: "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

tion of parties, as applied in allowing the substitution of the predecessor of the plaintiff in error as the party defendant, are invalid because of repugnancy to the laws of the United States.

The record, however, does not show that this question was either presented to or passed upon by the Appellate Division. No reference to the Practice Act or challenge to its validity appears in the proceedings either at Trial Term or in the Appellate Division.[*]

It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. *Whitney* v. *California*, 274 U. S. 357, 360; and cases cited. It is not enough that there may be somewhere hidden in the record a question which if it had been raised would have been of a federal nature. *Dewey* v. *Des Moines*, 173 U. S. 193, 199; *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 634; *Whitney* v. *California*, *supra*, 362.

For these reasons the writ of error must be dismissed. And, regarding the writ, under the Jurisdictional Act, as a petition for certiorari, it is denied.

Writ of error dismissed for want of jurisdiction; certiorari denied.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[*] In this respect the present case is essentially different from Davis v. Cohen Co., 268 U. S. 639, 640, in which the plaintiff in error had at the outset challenged the validity of any provisions of the Massachusetts Laws purporting to authorize the proceeding by which he had been substituted as the party defendant, as being repugnant to the Transportation Act, and had preserved this objection at every stage of the case.